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No. 1398

In the Supreme Court of the United States

OCTOBER TERM, 1969

ALOE CREME LABORATORIES, INC.,

Petitioner,

vs.

MILSAN, INC. and HYMAN GREENGLASS and MILDRED GREENGLASS doing business as SANDRA LEE PRODUCTS and MIAMI ALOE VERA COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

PAGE

References to Opinion Below 1

Jurisdiction 2

Questions for Review 2

Statement of the Case 3

The Reasons Relied Upon for Allowance of This Writ 7

Respondents Produced No Witnesses to Rebut Petitioner's Evidence Establishing Secondary Meaning in Its ALO- Trademarks 10

The Court of Appeals Did Not Follow the Applicable Law of This Court on Secondary Meaning 10

Conclusion 12

Appendix:

A—Opinion, U.S. Court of Appeals for the Fifth Circuit, *Aloe Creme Laboratories, Inc.* v. *Milsan, Inc., et al.* .....App. 1

Judgment, U.S. Court of Appeals, Fifth Circuit, dated March 9, 1970 .....App. 12

B—Opinion of the Court of Appeals dated July 31, 1969 .....App. 13

C—Opinion of the Court of Appeals dated January 9, 1970 .....App. 22

TABLE OF CASES

PAGE

American Aloe Corporation v. Aloe Creme Laboratories, Inc., 164 USPQ 266 11

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 191 10

Coca-Cola Co. v. The Koke Co., 254 U.S. 143 11

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Aloe Creme Laboratories, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 9, 1970.

REFERENCES TO OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit of March 9, 1970, has not yet been reported. It appears in the appendix hereto. The judgment is dated March 9, 1970.

JURISDICTION

Jurisdiction arises under the trademark laws of the United States (15 USC 1114-1122).

The date of the judgment sought to be reversed is March 9, 1970. This Judgment appears in the Appendix. The Court of Appeals on March 18, 1970, entered an order staying the mandate until April 17, 1970, to permit petitioner to file this petition for writ of certiorari. 15 USC 1122 confirms jurisdiction of this Court and states: "Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this act."

QUESTIONS FOR REVIEW

1. Whether plaintiff, Aloe Creme Laboratories, Inc., being the original, first and exclusive user of ALO-FACE, ALO-PLUS, TRAV-ALO, ALO-HANDS, ALO-COSMETICS, ALO-RELIEF, ALO and Design, ALO-OINTMENT, ALO-MOISTURE PLUS, ALO-DERM, ORIGIN-ALO, ALO-EYES, and ALO-BODY, in a family of ALO- marks has so long and so extensively used them on and in connection with cosmetic and pharmaceutical preparations that they have come to indicate only said plaintiff as the source of origin of said products, and that plaintiff has acquired secondary meaning in them.

2. Whether the Courts below erred in ignoring the overwhelming and uncontested evidence in the record that petitioner had established secondary meaning.

3. Whether the Court of Appeals for the Fifth Circuit erred in failing to follow the law on secondary meaning as determined by the Supreme Court of the United States as set forth in the leading cases of Coca-Cola Co. v. The Koke Co., 254 U.S. 143 and Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 191.

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STATEMENT OF THE CASE

The complaint in this case seeks to have the Court hold that petitioner's trademarks have acquired secondary meaning, and are valid and infringed by respondent's deliberate use of similar trademarks.

In 1953, petitioner began the creation and sale of ointments, and in 1957, cosmetics, and became a modern pioneer in the stabilization of gel of the aloe vera plant used in these products (T-10-16). Petitioner's said products were the first to have commercially acceptable shelf life (T-16).

In 1953, petitioner, a Florida corporation, was the creator and first user of the trade name Aloe Creme Laboratories, Inc. and has continuously used it to date and its use has never been restrained (Pre-trial stipulation, paragraph (a); T-11-13).

Petitioner's first product in 1953, was put out under the trademark ALO-CREME OINTMENT, and abbreviated in 1963 to ALO-OINTMENT (T-10-14). Petitioner's cosmetics, introduced in 1957 under the trademarks ALO-CREME FACE, ALO-CREME HANDS and ALO-CREME BODY were abbreviated in 1963 to ALO-FACE, ALO-HANDS and ALO-BODY (T-10-16).

Petitioner has used these trademarks on its products to date and at least since 1963 has also used the trademarks ALO-PLUS, TRAV-ALO, ALO-RELIEF, ALO- and Design, ALO-MOISTURE PLUS, ALO-V SKIN CLEANSER, ALO-BEAUTY MATTE, ALO-TONE and ALO-COSMETICS (T-10-12; Pl.Ex. 30-50).

Petitioner's ownership of these trademarks has been recognized by the U.S. Patent Office, which has granted it 18 registrations thereon. (T-28-30, Pl.Ex. 16-33).

Sales of petitioner's ALO- products have been extensive. Total sales of petitioner's ALO- products from 1953 to date are approximately twelve million dollars (T-19).

Petitioner's use of its original trade name and family of ALO- trademarks has been for such a long period of time and so extensive that prospective purchasers and consumers, the trade, competitors, the news media and the general public have come to identify products so marked as associated only with petitioner (T-92-3, 106, 113, 122-5, 134, 137, 143, 179, 187, 221). Respondents, who were well aware of petitioner and its products, later came along, and deliberately adopted and used as trademarks ALOE VITA, ALOE MAGIC, and other similar marks and means on competing products all likely to cause confusion (T-253-4).

Respondents recognized plaintiff's trademark use of ALO in paragraph 5 of the answer when it was stated "Defendants admits that the Plaintiff has certain products which it markets under the name of ALO." (R 731)

Respondents, Hyman Greenglass and his wife Mildred Greenglass, are the sole owners of respondent Milsan, Inc., and Hyman Greenglass is the executive officer of Milsan, Inc., a Florida corporation (pre-trial stipulation (R 409-423), paragraph (b); T-229, 264). Originally the corporate name Green's Discount Store was used and under Mr. Greenglass' direction in 1964 and 1965, had sold petitioner's ALO-MOISTURE PLUS, FASHION TAN, AFTER TAN, and, in fact, most of petitioner's products (Pre-trial stipulation, paragraph (c); T-246-8). Mr. Greenglass was thoroughly familiar with respondent's ALO trademarks and products (T-254).

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Respondent's adoption of its trademarks, including ALOE MAGIC, ALOE VITA and the like (T-234, 261, 269), was not innocent, but with full knowledge of petitioner's prior rights and was deliberately adopted to sustain the illusion that respondents were in some way connected with petitioner so as to cause confusion to respondent's benefit and loss to petitioner, the trade and the purchasing public.

The District Court rendered its decision orally at the end of the trial (A. 462), and did not cite any portions of the testimony in support of his decision which became the Findings of Fact (A. 474). The District Court erroneously stated that the testimony showed that the consuming public went into stores and wanted and asked for aloe but did not specify petitioner's ALO of Aloe Creme Laboratories, Inc. There was not a single bit of testimony specifically cited by the Court to support this statement, which is in effect an erroneous Finding of Fact (A 474).

The Court of Appeals for the Fifth Circuit correctly stated in its opinion that:

> "Since 1953, appellant has continuously used 'Alo' as a part of the trademarks of its products. In this period, it has gradually won a nationwide market among the discriminating consumers of cosmetics. The value and quality of appellant's products and the success of its business have been recognized by independent writers in newspaper and magazine articles exhibited to the district court. These articles designated the Florida-based corporation as the single source of 'Alo' cosmetics."
>
> "Appellant has expended almost $3,000,000 in an effort to place the word 'Alo' on the lips of every prospective female customer in the American market place. Its advertisements have appeared in such na-

tional publications as 'Harper's Bazaar,' 'Beauty Fashion', and 'Vogue'. It engages in newspaper advertisement throughout the country in cooperation with local retail establishments. Local dealers also cooperate in displays and promotions within their stores, including demonstrations of 'Alo' products conducted by appellant's staff of beauty consultants."

The opinion of the Court of Appeals continues to correctly state that:

> "The most direct evidence of the attitude of consumers came from eight witnesses, connected with different establishments selling appellant's products at retail. They shared the opinion that 'Alo' meant appellant's products, and testified that their customers intended appellant's products when they asked for 'Alo'."

The Court of Appeals agreed with the District Court when it stated:

> "However, only one of these witnesses worked in a store which sold both Milsan's and appellant's cosmetics. The remaining seven witnesses handled only the aloe products sold by appellant. The district court attached more significance to the testimony of the one witness with experience in selling both products. It concluded that the consumer in asking for aloe was seeking a general class of cosmetics and not appellant's particular goods."

However, in spite of all the evidence to the contrary the Court of Appeals held that petitioner had not acquired secondary meaning and it is respectfully submitted erroneously misconstrued the testimony of the only witness relied upon by both the District Court and the Court of Appeals. Such ruling is in conflict with the decisions of this Court.

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THE REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT.

The one witness who sold both petitioner's and respondents' goods is Mrs. Geisler of Woolco. In her testimony she said that aloe meant the products of only one company, namely, Aloe Creme Laboratories, Inc., the petitioner (A. 187). Her testimony in detail is as follows:

> "Q. From your experiences in the trade with the customers I will ask you what does the word 'aloe' mean to you?
>
> A. To me, myself?
>
> Q. Yes.
>
> A. It means one product, Aloe Creme of Fort Lauderdale, or Aloe Creme Laboratories of Fort Lauderdale."

The Court of Appeals' decision in quoting Mrs. Geisler failed to quote the following paragraph of her testimony:

> "Q. Which of the Aloe Creme Laboratories' products does Woolco maintain in their store?
>
> A. We have a complete line of the Alo Cosmetics." (A. 188).

The testimony of all of the witnesses overwhelmingly established that petitioner had established secondary meaning in ALO. This testimony is not contested in any way.

Clare Groh, buyer at Sears, Roebuck in Fort Lauderdale, testified that people ask "for ALO products" (A 104), because ALO means "Aloe of Fort Lauderdale or the original ALO" (A 106).

The manager of Burdine's Fort Lauderdale store, Mr. Kristell, said that aloe meant "the products made by Aloe

Creme Laboratories, in Fort Lauderdale" (A 94). They are sold by their name "because this is the way the people buy their merchandise. Brand names mean an awful lot in my business" (A 99).

"When people come into Burdine's (in Miami Beach) to ask for petitioner's products . . . they ask for Alo" (A 112), because ALO means "The Aloe Creme Laboratories from Fort Lauderdale. It is their product" (A. 113), testified Mrs. McCormick.

There is substantial repeat business and petitioner's products are called for by their ALO- trademarks (A 125, 137), or as "ALO- COSMETICS, or ALO- Products" (A 130). Aloe means "Aloe Creme Laboratories, in Fort Lauderdale" to Mrs. Patterson of the International Pharmacy at the Miami airport (A 135, 137).

Mr. Stuart, owner of Park Pharmacy in Fort Lauderdale, testified that people ask for Aloe Creme and associate it with the petitioner (A 178-9). ALO "means the product, Aloe Creme Laboratories of Fort Lauderdale" (A 187), was the statement under oath of Mrs. Geisler of Woolco (A 184). Customers ask for ALO cosmetics (A 185).

There is no basis for the holdings below that the reason that ALO meant only the petitioner, was because the witnesses only knew of, or sold, petitioner's goods. There is no basis for this holding because they knew of respondents, and their goods.

The fact is that the witnesses knew of respondents before they testified in this case. Mrs. Groh testified that she knew of respondents and wanted to protect her customers at Sears against confusion by not handling respondents'

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products (A 106, 110). Mrs. Goold had seen respondents' products (A 126). Mrs. Patterson knew of them (A 136) as did Miss Landy (A 143). Mr. Stuart was approached to sell respondents' cosmetics (A 179-180).

The one witness the District Court refers to who sold both petitioner's and respondent's products must be Mrs. Geisler who has already been quoted as stating under oath that ALO means "one product, Aloe Creme of Fort Lauderdale, or Aloe Creme Laboratories of Fort Lauderdale (A 187). At Woolco, where Mrs. Geisler is the cosmetician, the store sells the products of Aloe Creme Laboratories, Inc. and Milsan, Inc. (A 185).

In this connection, Mrs. Geisler testified:

> "Q. Do any customers come in and ask you if the defendant's products have any connection with Aloe Creme Laboratories, Inc.?
> A. Yes they do. They ask if it is the ALO product." (A 186).

Because there is such likelihood of confusion Mrs. Geisler testified:

> "Q. Do you sometimes find it necessary to explain to customers the difference between the plaintiff and the defendant's product?
> A. Yes, we do." (A 200).

There is no testimony in the record to the contrary.

It is submitted that in view of the foregoing overwhelming testimony that ALO meant only the petitioner Aloe Creme Laboratories, Inc. that it was clearly erroneous for the lower courts to hold that customers wanted any product containing aloe vera gel.

RESPONDENTS PRODUCED NO WITNESSES TO REBUT PETITIONER'S EVIDENCE ESTABLISHING SECONDARY MEANING IN ITS ALO- TRADEMARKS.

There is not a scintilla of evidence that people go into stores to buy just any products containing the gel of the aloe vera plant. In fact, respondents produced no witnesses at all on this point. On the contrary, the evidence is complete and replete that when people see or ask for Alo- products that they mean and buy only petitioner's cosmetics and associate Alo- trademarks exclusively with petitioner.

It is submitted that on this issue that the Lower Courts were in error.

THE COURT OF APPEALS DID NOT FOLLOW THE APPLICABLE LAW OF THIS COURT ON SECONDARY MEANING.

An important basis for this Writ lies in the failure of the Court of Appeals to follow the law of secondary meaning established by the Supreme Court of the United States.

In *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 US 191, holding that NU-ENAMEL, although descriptive of paint enamels, had acquired secondary meaning and was infringed by defendant's use of NU-BEAUTY ENAMEL. This Court said:

> "Here we have a secondary meaning in the descriptive term NU-ENAMEL. This establishes, entirely apart from any trademark act, the common law right of the Nu-Enamel Corporation to be free from the competitive use of these words as a trademark or trade name.
>
> "The right arises not from the trademark acts, but from the fact that NU-ENAMEL has come to indicate the goods in connection with which it is used

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are the goods manufactured by the respondent. When a name is endowed with this quality, it becomes entitled to protection."

Another famous case is *Coca Cola Co.* v. *The Koke Co.*, 254 US 143. Originally COCA COLA contained coca leaves and cola nut extract. This Court held that COCA COLA for a soft drink had acquired a secondary meaning and that the defendant had chosen KOKE for the purpose of reaping the benefit of the work done by plaintiff and should be restrained. The *Koke* case is practically on all fours with the case at bar.

In addition, another basis for the granting of this Writ lies in the conflict of decisions on the secondary meaning of petitioner's ALO trademarks between the U.S. Court of Appeals for the Fifth Circuit, and that of the U. S. Court of Appeals for the Seventh Circuit.

In a similar case involving substantially the same issues namely, *American Aloe Corporation* v. *Aloe Creme Laboratories, Inc.*, reported in 164 USPQ 266, the Court of Appeals for the Seventh Circuit also failed to follow the said law of the Supreme Court of the United States on secondary meaning, and substituted a rule of its own holding that petitioner could never acquire secondary meaning in a so-called denominative word. A petition for writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit is being prepared and concurrently filed by petitioner in Aloe Creme Laboratories, Inc. v. American Aloe Corporation.

The Court of Appeals for the Fifth Circuit stated that the Court of Appeals for the Seventh Circuit in the said *American Aloe* case "created a category, which it called denominative" in holding against secondary meaning, "without the necessity of discussing any evidence relevant to the claim." In other words instead of deciding

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the factual issue of secondary meaning on the evidence, the Court of Appeals of the Seventh Circuit held that petitioner's trademark being denominative could not acquire secondary meaning on any evidence. The evidence overwhelmingly established that petitioner had acquired secondary meaning in its ALO- trademarks. The Court of Appeals of the Fifth Circuit disagreed with the Seventh Circuit and said:

> "Moreover, denomination appears to be a new damnation for aspiring trademarks. By placing 'Alo' in this category, the court denied secondary meaning without the necessity of discussing any evidence relevant to the claim. We do not believe the present case can be resolved by the application of an appropriate epithet—be it generic description or denomination."

Because of this conflict between the two Circuits on secondary meaning, it is submitted that the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27791

Aloe Creme Laboratories. Inc.,

Plaintiff-Appellant,

VS.

Milsan, Inc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(March 9, 1970)

Before WISDOM, GEWIN and AINSWORTH, *Circuit Judges.*

GEWIN, *Circuit Judges* This trademark case involves the commercial exploitation of the "beauty secret of the Nile"—the aloe vera plant. We must decide whether appellant has earned an advantage in presenting the panacea of Egyptian royalty to the American housewife. Aloe Creme Laboratories, Inc., brought suit in the United States District Court for the Southern District of Florida alleging infringement of its registered trademarks and unfair competition by appellee, Milsan, Inc.[1] As a part of

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[1] Jurisdiction was alleged under 15 U.S.C. § 1121, as a case arising under the trademark laws of the United States.

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its judgment,[2] the district court found the term "Alo," as used in appellant's trademarks, was descriptive of its products and without a secondary meaning. Appellant contends that the court's finding with respect to secondary meaning is clearly erroneous. We affirm.

Our review of the record indicates that appellant apart from its claim of secondary meaning, sought relief in the district court under the common law doctrine historically known as palming off.[3] This is another species

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[2] The court found Milson guilty of certain acts of infringement and unfair competition, from which there is no appeal. See discussion, *infra*.

[3] Appellant's complaint alleged:

> 14. Defendants' use of the said trademarks on their products is designed to sustain the illusion that defendants are in some way connected with plaintiff so as to enable defendants or its dealers or stores to palm off said products as and for those of plaintiffs. . . .

The pre-trial stipulation contained a list of factual issues remaining to be resolved at trial including:

> (i) Whether defendant's uses of the trademarks ALOE VITA, ALOE MAGIC, OIL OF ALOE, LOTIONS OF ALOE, ALOES OF ALOE, ALOESETTE, POWDERS OF ALOE, TANS OF ALOE and TAN PRESERVER WITH ALOE VITA, and the Design of Plant on its products are designed to sustain the illusion that defendant is in some way connected with plaintiff, so as to enable defendant or its dealers or stores to palm off said products as and for those of said plaintiff and have caused damage to said plaintiff and injury to the trade and purchasing public.

In ruling on the case, the district court answered the questions posed in the stipulation. Except as to Milsan's use of the "Design of Plant" mark and its presentation of its TAN OF ALOE and TAN PRESERVER products, the court answered question (i) in the negative.

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of protection from unfair competition. Inasmuch as appellant's notice of appeal strictly limited the portion of the judgment of which review was sought,[4] we do not consider the district court's determinations regarding palming off to be properly before us.[5]

In 1953, appellant, a Florida corporation with its principal place of business in Ft. Lauderdale, Florida, began selling products containing gel of the aloe vera plant. The medicinal properties of this tropical plant have been known since ancient times,[6] but, until recently, the rapid deterioration of the extracted gel had limited its use to areas where the plant is endemic. Appellant was able suc-

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[4] Appellant's notice of appeal states:

. . . plaintiff herein appeals . . ., *only* from that portion of Paragraph 1 of the Judgment . . . reading as follows:

"1. Plaintiff has not acquired secondary meaning in either 'Alo' or 'Aloe', and plaintiff's trademarks have not been infringed by defendant's use of 'Alo' or 'Aloe'." (emphasis supplied)

It should also be noted that appellant drafted the final judgment from which the quotation is taken.

[5] We consider the disposition of the claim for palming off to be independent of the claims of secondary meaning and trademark infringement inasmuch as they involve different elements of proof. *See* Nolan v. Coating Specialists, Inc, ... F.2d ..... (1970) [No. 28388, Jan. 29, 1970]; Martin v. Atlantic Coast Line R.R. Co., 289 F.2d 414, 417 n.5 (5th Cir. 1961). *See* generally 9 J. Moore, Federal Practice § 73.14, at 3221 (2d ed. 1953).

[6] There are records of the plant's use in ancient Egypt, classical Greece, and 8th century China, as well as references in the Bible. It is recorded that the body of Jesus was annointed with Aloes. John 19:39-40. The plant was historically used to treat burns and skin irritation, and taken internally for a variety of ailments.

cessfully to market aloe products through its development of a stabilized aloe gel with a commercially acceptable shelf life.

The first of these products was an ointment for the treatment of burns originally sold under the name ALO-CREME OINTMENT. In 1957, appellant introduced its first cosmetics under the trademarks ALO-CREME FACE, ALO-CREME HANDS, and ALO-CREME BODY. In 1963, these names were abbreviated to ALO-OINTMENT, ALO-FACE, ALO-HANDS, and ALO-BODY respectively. Since 1963, appellant has used the following trademarks on its expanded line of products: ALO-PLUS, TRAVEL-ALO, ALO-RELIEF, ALO-and Design, ALO-MOISTURE PLUS, ALO-V SKIN CLEANSER, ALO-BEAUTY MATTE, ALO-TONE, ALO-ROUGE, ALO-LIPSTICK, ALO-POUDRE, ALO-V SHAMPOO, ALO-COSMETICS, ALO-CABANA SET, ALO-LEGS, Design of Plant,[7] QUEEN NEFERTITI, FASHION TAN and AFTER TAN.[8] "Alo" products have enjoyed nationwide sales of approximately $12,000,000.

Milsan, Inc. is a Florida corporation with its principal place of business in Hialeah, Florida. Hyman Greenglass and his wife, Mildred, also appellees, are the only stockholders and executive officers of Milsan. The same corporation, under the name of Green's Discount Stores, formerly operated a discount drug store in Miami Beach,

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[7] This design is depicted in Registration No. 811,159 and is a stylized representation of the Aloe Vera Plant.

[8] Appellant has eighteen registrations for its trademarks issued by the U.S. Patent Office. In order to obtain registration of trademarks containing the term "Alo," appellant disclaimed the term, though expressly reserving its common law rights.

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Florida. In 1964-65 this store sold various of appellant's products.

In 1965, Milsan began marketing cosmetics containing a solution of aloe powder. Milsan's trademarks include: TANS OF ALOE, TAN PRESERVER, LOTIONS OF ALOE, OIL OF ALOE, ALOES OF ALOE, ALOE MAGIC, ALOESETTE, POWDERS OF ALOE, ALOE FACE CREME, ALOE VITA, and SANDRA LEE. Its products are sold chiefly in grocery and discount drug stores at prices substantially less than appellant's comparable products.

On November 30, 1965, appellant, through its counsel, sent Milsan an infringement notice. Milsan admits receipt of the notice, but did not reply or in any way alter its activities. Appellant initiated the present action on April 5, 1966, claiming trademark infringement and unfair competition.

The case was tried without a jury. The court found appellant's registered "Design of Plant" mark valid and infringed by the use of a similar mark on Milsan's products. Accordingly, this practice was enjoined. The court also found Milsan's TANS OF ALOE and TAN PRESERVER confusingly similar to appellant's FASHION TAN and AFTER TAN by reason of their overall appearance. The Milsan products were the same color and were sold in bottles similar to those used by appellant. The court criticized the script used on the labels of these products and the disproportionately small depiction of the trademark SANDRA LEE in relation to other elements of the labels. Milsan was ordered to remedy these sources of confusion. The court found that Milsan deliberately

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and willfully committed the above acts of trademark infringement and unfair competition in an effort to pass off its products as those of appellant. Milsan has not appealed from these adverse portions of the judgment.

In seeking to enjoin Milsan's use of "Aloe" as a portion of its trademarks, appellant contended that "Alo," whose original or *primary* meaning is descriptive, had acquired through use a *secondary* meaning indicating the goods of Aloe Creme Laboratories, Inc.[9] The court found that "Alo" was solely descriptive and without secondary meaning that would support relief. Appellant would have us characterize this evaluation of the evidence as clearly erroneous.

Considered today as a part of the broader law of unfair competition, the doctrine of secondary meaning is another avenue to protection of trade names independent of any trademark act. The doctrine has been accounted as the response of the common law to the realities of business life.[10] Apparently entrepreneurs can not resist the temptation to tie the name of their product to some dis-

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[9] The terms, primary and secondary, may be somewhat misleading since a secondary meaning entitled to protection must have become the *primary* meaning to the consumer. The problem may be avoided by thinking of the terms merely as temporal designations. 3 R. Callmann, Unfair Competition Trademarks and Monopolies § 77.1, at 338-340 (3d ed. 1969).

[10] *See generally* 3 R. Callmann, supra note 9, § 77.1.

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abling quality of description, geography, or vanity.[11] While this foible prevents recourse to the Act,[12] in a proper case the law will recognize the years of effort and expense, necessary to effect a turn of the public mind, with equivalent protection. Once secondary meaning is established, the beneficiary need only show a likelihood of confusion to enjoin an infringing use.

Appellant contends that its promotion of the "Alo" family of marks has created such a secondary meaning. Milsan insists that the term is incapable of acquiring secondary meaning because it is generically descriptive of appellant's products. Milsan's argument is erroneous.[13] The doctrine of secondary meaning is primarily concerned with descriptive marks and marks unregisterable for other

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[11] 15 U.S.C. § 1052 disqualifies certain kinds of marks from registration under the Lanham Act including one that:

> (e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, . . . or (3) is primarily merely a surname.

As stated in note 8 *supra*, registration of the "Alo" marks was obtained by means of a disclaimer which is authorized by 15 U.S.C. § 1056.

[12] The Lanham Act, 15 U.S.C. § 1051, *et seq.*

[13] Secondary meaning is an absolute concept; it converts a word originally incapable of serving as a mark into a full fledged trademark. . . . The strength or weakness of such a mark depends exclusively upon the vitality of its secondary meaning; to characterize such a mark as descriptive or geographical is error, for even the most famous marks would then be weak. 3 R. Callman, *supra* note 9 at 340-341.

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reasons enumerated in the Act.[14] The determination that "Alo" is descriptive is only effective to prevent recourse to the Act and does not simultaneously foreclose recourse to the doctrine of secondary meaning.

A similar, though more sophisticated, argument is embodied in *American Aloe Corp.* v. *Aloe Creme Laboratories, Inc.*[15] There the Seventh Circuit reversed a finding by the district court that the "Alo" tradename had acquired a secondary meaning entitled to protection. While we reach a result similar to our brethren of the Seventh Circuit, we do so for somewhat different reasons.

In its opinion, the *American Aloe* court sought to bring some order to the perplexing array of secondary meaning cases, by classifying them according to the relationship between the term claimed and the article to which it was applied. The court created a category, which it called denominative, to distinguish certain cases from those involving the general run of descriptive marks. The category neatly encompasses a group of cases where the mark claimed was the common name of the article.[16] In these cases, the uniform refusals of the courts to find secondary meaning are supported by a valid policy consideration. This policy consideration is grounded upon the fact that

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[14] 15 U.S.C. § 1052(e), see note 11 *supra*.

[15] ..... F.2d ..... (7th Cir. 1970), [No. 17250, Jan. 9, 1970], *rev'g* 291 F.Supp. 645 (N.D. Ill. 1968).

[16] Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938) (shredded wheat); Henry Heide, Inc. v. George Ziegler Co., 354 F.2d 574 (7th Cir. 1965) (Ju-Jubes); Donald F. Duncan, Inc. v. Royal Tops Manufacturing Co., 343 F.2d 655 (7th Cir. 1965) (yo-yos).

the recognition of property rights in the common name of an article could be tantamount to granting a monopoly in that commodity.

The Seventh Circuit, however, expanded its denominative category to include a group of cases involving marks that were descriptive because they referred to an ingredient of the product involved.[17] The policy in the former instance, just mentioned above, appears less persuasive in this situation. The "ingredient" cases reach different results, and must be reconciled on the basis of factual distinctions. Their inclusion tends to diminish the homogeneity of the denominative category.

Moreover, denomination appears to be a new damnation for aspiring trademarks. By placing "Alo" in this category, the court denied secondary meaning without the necessity of discussing any evidence relevant to the claim. We do not believe the present case can be resolved by the application of an appropriate epithet—be it generic description or denomination.[18]

A claim of secondary meaning presents a question of fact.[19] The chief inquiry is the attitude of the consumer

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[17] Compare LeBlume Import Co. v. Coty, 293 F. 344 (2d Cir. 1923) (L'Origan—for perfume); Pinaud, Inc. v. Huebscham, 27 F.2d 531 (E.D. N.Y. 1928) (Lilas De France—for perfume); Wells & Richardson Co. v. Siegel, Cooper & Co., 106 F. 77 (N.D. Ill. 1900) (Celery Compound) with Dixi-Cola Laboratories, Inc. v. Coca-Cola Co., 117 F.2d 352 (4th Cir. 1941) (cola—for soft drink).

[18] See note 13 *supra*.

[19] Speed Products Co. v. Tinnerman Products, Inc., 222 F.2d 61, 66 (2d Cir. 1955); Little Tavern Shops, Inc. v. Davis, 116 F.2d 903, 906 (4th Cir. 1941).

toward the mark; does it denote to him a, ". . . single thing coming from a single source . . .?"[20] Short of a survey, this is difficult of direct proof. The record of the case presently before the court contains considerable evidence by which appellant sought to inferentially establish the public mind.

Since 1953, appellant has continuously used "Alo" as a part of the trademarks of its products. In this period, it has gradually won a nationwide market among the discriminating consumers of cosmetics. The value and quality of appellant's products and the success of its business have been recognized by independent writers in newspaper and magazine articles exhibited to the district court. These articles designated the Florida-based corporation as the single source of "Alo" cosmetics.

Appellant has expended almost $3,000,000 in an effort to place the word "Alo" on the lips of every prospective female customer in the American market place. Its advertisements have appeared in such national publications as "Harper's Bazaar," "Beauty Fashion", and "Vogue". It engages in newspaper advertisement throughout the country in cooperation with local retail establishments. Local dealers also cooperate in displays and promotions within their stores, including demonstrations of "Alo" products conducted by appellant's staff of beauty consultants. In considering this evidence, it must be remembered that the question is not the *extent* of the promotional efforts, but their *effectiveness* in altering the meaning of "Alo" to the consuming public.[21]

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[20] Coca-Cola Co. v. Koke Co., 254 U.S. 143, 146 (1920).

[21] See Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F.2d 416 (2d Cir. 1952); *See generally* 3 R. Callmann, *supra* note 9, § 77.3.

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The most direct evidence of the attitude of consumers came from eight witnesses, connected with different establishments selling appellant's products at retail. They shared the opinion that "Alo" meant appellant's products, and testified that their customers intended appellant's products when they asked for "Alo". However, only one of these witnesses worked in a store which sold both Milsan's and appellant's cosmetics. The remaining seven witnesses handled only the aloe products sold by appellant. The district court attached more significance to the testimony of the one witness with experience in selling both products.[22] It concluded that the consumer in asking for aloe was seeking a general class of cosmetics and not appellant's particular goods.

We agree with *American Aloe* insofar as it holds that the evidentiary burden, necessary to establish secondary meaning, is substantial where the mark applied to an article designates a principal ingredient desired by the public. After reviewing the evidence in this regard, we can not say that the district court was clearly erroneous[23] in finding appellant's showing insufficient.

Accordingly, the judgment is AFFIRMED.

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[22] This witness was Mrs. Frieda Geisler, an employee of Woolco Department Store in Ft. Lauderdale, Florida. Her testimony includes the following:

By The Court:

Q. If somebody came into your store and asked you for some aloe cream what do you say?

A. We have to say which aloe cream are you interested in. Are you interested in the Aloe Creme Laboratories cream of Fort Lauderdale, the cosmetics, or in the Sandra Lee's cosmetics?

[23] Rule 52(a), Fed. R. Civ. Pro.

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In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27791

D. C. Docket No. CA 66-462-JE

ALOE CREME LABORATORIES, INC.,
Plaintiff-Appellant,

Versus

MILSAN, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, GEWIN and AINSWORTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

March 9, 1970

Issued as Mandate:

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APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 17250 SEPTEMBER TERM 1968 — APRIL SESSION 1969

AMERICAN ALOE CORPORATION

v.

ALOE CREME LABORATORIES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 31, 1969

Before CASTLE, *Chief Judge*, FAIRCHILD, *Circuit Judge* and BEAMER, *District Judge*.[1]

BEAMER, *District Judge*.

This is an appeal from the Northern District of Illinois involving claims of trademark infringement and invalidity, and cross charges of unfair competition and antitrust violations. The central question before the Court is the validity of defendant-appellee's ALO-trade names, and plaintiff-appellant's alleged infringement thereof.

Defendant Aloe Creme Laboratories, Inc. began the sale of an ointment in 1953, and cosmetics in 1957, both

[1] Judge Beamer is sitting by designation from the Northern District of Indiana.

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containing the gel of the sub-tropical aloe vera plant. The use of the fresh gel from the cut leaves of this plant had long been known to the natives of the region in which it is grown as a remedy for sun burn. Prior to defendant's entry into the market and its development of a process of stabilizing and preserving the gel, it had too short a shelf life to be commercially valuable. Due to defendant's efforts over the intervening years, its products, containing Aloe vera gel, became widely known and commercially successful. Beginning in 1953 and throughout this period, the defendant operated under the trade name "Aloe Creme Laboratories, Inc." Its first product was known under the trade name ALO-CREME OINTMENT which was changed to ALO-OINTMENT in 1963. Commencing in 1957, defendant began the manufacture of various cosmetics known as ALO-CREME FACE, ALO-CREME HANDS, and ALO-CREME BODY, which names were abbreviated to ALO-FACE, ALO-HANDS, and ALO-BODY in 1963. Since 1963, the defendant has also used the trademarks ALO-PLUS, TRAV-ALO, ALO-MOISTURE PLUS, ALO-V SKIN CLEANSER, ALO-BEAUTY MATTE, ALO-TONE, ALO-ROUGE, ALO-LIPSTICK, ALO-POUDRE, ALO-V SHAMPOO, ALO-COSMETICS, ALO-CABANA SET, ALO-LEGS, FASHION TAN and AFTER TAN, all of which were the subject of trademark registrations. In dispute on appeal is the defendant's use and registration of ALO- and design.

Plaintiff commenced operations on January 20, 1964, and made its first sales of products bearing trademarks on March 8, 1965. Plaintiff adopted as its trademarks, HOUSE OF ALOE, ALOE ESSENCE, DESIGN OF PLANT, JEL D'ALOE, MASQUE OF ALOE and TROPICALOE. After defendant notified plaintiff of its

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claim to a family of ALO trademarks which it claimed was infringed by plaintiff's use of ALOE in its trade names, plaintiff commenced this action asking a declaratory judgment finding defendant's trademarks invalid and upholding plaintiff's right to use its ALOE trademarks. Defendant counterclaimed for trademark infringement and unfair competition. Plaintiff then amended its complaint to charge defendant with violations of the unfair competition and antitrust laws. The district court found for the defendant-counterclaimant on all issues; dismissed the complaint; awarded treble damages and enjoined the plaintiff from using ALOE in its trade names or trademarks. We affirm in part and reverse in part.

The crucial issue on appeal is whether "Aloe" and its phonetic equivalents is a generic name, incapable of being trademarked, or whether defendant has established a sufficient secondary meaning in the name ALOE to preclude others from using it in their trade names. We find that "Aloe" is a generic name, normally incapable of becoming a trademark, and that defendant has not established a secondary meaning in the term, or "family of trademarks" such as to preclude others from using "Aloe" in their trade names.

Aloe is the generic name of a large genus of succulent plants and of the drugs prepared from the aloe vera variety of that plant. (Webster's New International Dictionary, 2d ed. 1934.) In particular, for purposes of this case, it is the generic name for the gel of the Aloe vera plant. It is undisputed that in the absence of a strong showing of secondary meaning, a generic name cannot be the basis of a trademark. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111; 83 L.ed. 73 (1938) (shredded

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wheat); *Henry Heide, Inc.* v. *George Zeigler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 343 F.2d 655 (7th Cir. 1965) (yo-yos).

Defendant concedes that this is the law, but maintains that it is not marketing "Aloe" as such, but is selling cosmetics containing Aloe, which are not encompassed within the generic or descriptive name and with respect to which the word "Aloe" is at most, suggestive. In view of the fact that Aloe is the distinguishing ingredient in defendant's products upon which its claims to special effectiveness are based, the Court must find that "Aloe" is the generic and descriptive term for that class of cosmetics containing Aloe and that any claim to a trademark in the name must be based on "secondary meaning".

The case is unlike *Coca-Cola Co.* v. *Koke Co.*, 254 U.S. 143, 65 L.ed. 189 (1920) where the term Coke or Coca was originally descriptive of the extract of Coca leaves, or cocaine contained in the plant, but which lost this generic sense when the plaintiff was compelled to remove any effective cocaine from the product, after which Coca or Coke acquired a purely secondary meaning. Neither is this case controlled by those decisions which have found that exact copies or phonetic equivalents infringe purely suggestive names which have acquired trade name significance, such as *Douglas Labs. Corp.* v. *Copper Tan, Inc.*, 210 F.2d 453 (2nd Cir. 1954) which said "copper tone" for sun tan lotion was suggestive rather than descriptive, and *Orange Crush Co.* v. *California Crushed Fruit Co.*, 297 F.2d 892 (D.C. Cir. 1924) which said "Crush" was not descriptive of a soft drink and was not used in its generic sense; nor is it in the same class

with those which hold that terms having a general descriptive but not denominative sense acquired secondary meaning. *Keller Products, Inc.* v. *Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954) (*Tub Cove* v. *Tub Kove*); *Speaker* v. *Shaler Co.*, 87 F.2d 985 (7th Cir. 1937) (*Hot Patches* v. *Hot Patches*—for vulcanizing products); *Barton* v. *Rex-Oil Co., Inc.*, 29 F.2d 474 (3rd Cir. 1928) (*Dynashine* v. *Dye & Shine*—for shoe polish). It must also be distinguished from the Supreme Court's decision in *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 83 L.ed. 195 (1939) where the essentially descriptive and denominative term "nu-enamel" had acquired a secondary meaning at least partially through its widespread application to products other than enamel —such as paint brushes.

This case is properly classified with those where the term in question was the common name for the article sold and hence denominative of that article regardless of source. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111; 83 L.ed. 73 (1938) (shredded wheat); *Henry Heide, Inc.* v. *George Zeigler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 342 F.2d 655 (7th Cir. 1965) (yo-yos) and particularly with those cases where the term was denominative of the prime or distinguishing ingredient in the product. Compare *LeBlume Import Co.* v. *Coty*, 293 F. 344 (2nd Cir. 1923) (*Lorigan* v. *L'Origan de Coty* —for perfume); *Pinaud, Inc.* v. *Huebschman*, 27 F.2d 531 (E.D. N.Y. 1928) (*Lilas De France* v. *Lilas De France* —for perfume); *Wells & Richardson Co.* v. *Siegel, Cooper & Co.*, 106 F. 77 (N.D. Ill. 1900) (*Celery Compound* v. *Celery Compound*) with *Dixie-Cola Laboratories, Inc.*

v. *Coca Cola Co.*, 117 F.2d 352 (4th Cir. 1941) (*cola* v. *cola*—for soft drink containing extract of cola nut). It is clear from an examination of the cases that while the test may be stated in the same language in both types of cases, it is much more difficult to establish secondary meaning in a denominative term (as used herein) than in a purely descriptive one.

The criteria for determining whether a denominative term has acquired the necessary secondary meaning to be a trademark are best described in the language of the Supreme Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 118; 83 L.ed. 73, 79 (1938):

> It is contended that the plaintiff has the exclusive right to the name 'Shredded Wheat,' because those words acquired the 'secondary meaning' of shredded wheat made at Niagara Falls by the plaintiff's predecessor. There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the middle of the consuming public is not the product but the producer.

In the recent decision of *Henry Heide, Inc.* v. *George Zeigler Co.*, 354 F.2d 574, 576 (7th Cir. 1965) dealing with the term "ju-jubes" for fruit flavored gum candy, this Court said, "But more importantly, a generic term in circumstances such as those before us may not be

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exclusively appropriated as a trademark, regardless of the length of time it may have been used by a single distributor at the consumer level and despite whatever promotional effort he may have expended to exploit it." See *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 432 F.2d 655 (7th Cir. 1965); *Dixi-Cola Laboratories* v. *Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941).

The defendant-appellee, Aloe Creme Laboratories, Inc., here seeks to accomplish what the courts prohibited in the above cases. Having originated the use of a stabilized aloe gel in cosmetics and maintained a natural and legal monopoly in the product over a relatively long period of time, it seeks to prevent others from successfully competing in the Aloe cosmetic market by foreclosing their effective promotion of aloe products. The Court does not question its good faith, but it must find that defendant Aloe Creme Laboratories, Inc. cannot appropriate for its own trademark use, the generic name of the distinguishing and effective ingredient in its product. Defendant has neither patent rights in the "ingredient concept" of using Aloe in cosmetics nor a legal right to maintain a monopoly in Aloe cosmetics. By using the phonetic equivalent of the generic name as the sole common and distinguishing mark of its products, defendant invited confusion. Until 1963, defendant differentiated its product by the name ALO-CREME, which would have come nearer to maintaining its trademark significance, but in the two to three years between the adoption of the singular ALO- and the filing of this suit, "Aloe" or "Alo" did not lose its generic meaning or denominative sense. Those cases relied upon by defendant to establish the secondary meaning in the name of a plant used as an ingredient are distinguishable.

In *LeBlume Import Co.* v. *Coty*, 293 F. 344 (2nd Cir. 1923) the court found that Lorigan, or L'Origan, although generic when applied to a particular genus of plant, had come to mean the blended perfume produced by Coty, and not the fragrance of the particular plant. It laid stress on the fact that the perfume in question was a blend, unidentifiable with the genus of plants whose name it bore. In contrast, both plaintiff's and defendant's products here are promoted for their common ingredient —Aloe—with which both product lines are clearly identifiable. The defendant here cannot seek to promote its products by stressing the active ingredient which is available to all and also claim that the only proper name of that ingredient has lost its primary generic significance.

In *Pinaud, Inc.* v. *Huebschman*, 27 F.2d 531 (E.D. N.Y. 1928) the Court found that the French expression Lilas De France, when applied to a perfume long manufactured and promoted by one company, had acquired a secondary meaning, but it also indicated that the English counterpart of the same words, "French Lilac," was purely descriptive and without secondary meaning. In *Wells & Richardson Co.* v. *Siegel, Cooper & Co.*, 106 F. 77 (N.D. Ill. 1900) the Court found that the expressions "Celery Compound" had acquired a secondary meaning and that others could not copy it, but it did not find that "Celery" had acquired a similar meaning. Likewise here, the Court finds that the various ALO- trademarks of defendant in themselves are valid, but cannot be considered to have established a secondary meaning in the word Aloe itself. Others may not copy the exact trademarks used by defendant, because those have come to mean defendant's products exclusively, but they may use the word "Aloe" as part of their own trademark, just as defendant has done.

It is apparent that a generic term cannot be the basis for a "family of trademarks" unless that term itself has

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achieved trademark significance through its secondary meaning. Compare *Laurtzen & Co., Inc.* v. *Borden Company*, 239 F.2d 405 (Court of Custom and Patent Appeals, 1956) with *Motorola, Inc.* v. *Griffiths Electronics, Inc.*, 317 F.2d 397 (Court of Customs and Patent Appeals, 1963).

Having so concluded, we must therefore reverse the district court's conclusion insofar as it found that defendant had established a secondary meaning in the term "Aloe" or "Alo" and that plaintiff's use of its Aloe trade names infringed defendant's family of ALO- trademarks. We also reverse the trial court's conclusion of law that plaintiff's TAN LIFE infringed defendant's FASHION TAN and AFTER TAN trademarks, because the only common word, "tan", is too descriptive to be the basis of trademark rights under the facts of the case. Finally, we reverse the district court's conclusion that the plaintiff was guilty of unfair competition and should pay treble damages, because the findings of fact, in the absence of trademark infringement, are insufficient to support those conclusions.

We specifically affirm the district court's conclusions upholding the validity of defendant's trademarks as registered and absolving the defendant of liability for unfair competition and antitrust violations. The judgment is reversed and the case remanded for entry of judgment in accordance with this opinion.

The appellant shall recover 2/3 of his costs expended on appeal.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 17250 SEPTEMBER TERM 1968 — APRIL SESSION 1969

AMERICAN ALOE CORPORATION,

Plaintiff-Appellant,

v.

ALOE CREME LABORATORIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 9, 1970

ON PETITIONS FOR REHEARING[1]

Before CASTLE, *Chief Judge*, FAIRCHILD, *Circuit Judge* and BEAMER, *District Judge*.[2]

[1] On consideration of the petitions for rehearing filed by each of the parties and the answer of defendant-appellee to plaintiff-appellant's petition (filed at the request of the Court) the opinion filed herein July 31, 1969, is withdrawn and this opinion is adopted as the opinion of the Court.

[2] Judge Beamer is sitting by designation from the Northern District of Indiana.

BEAMER, *District Judge.* This is an appeal from the Northern District of Illinois involving claims of trademark infringement and invalidity, unfair competition and antitrust violation and counterclaims based on similar charges. The central question before the Court is the validity of defendant-appellee's "ALO-" trade names, and plaintiff-appellant's alleged infringement thereof.

Defendant Aloe Creme Laboratories, Inc., began the sale of an ointment in 1953, and cosmetics in 1957, both containing the gel of the sub-tropical aloe vera plant. The use of the fresh gel from the cut leaves of this plant had long been known to the natives of the region in which it is grown as a remedy for sun burn. Prior to defendant's entry into the market and its development of a process of stabilizing and preserving the gel, it had too short a shelf life to be commercially valuable. Due to defendant's efforts over the intervening years, its products, containing Aloe vera gel, became widely known and commercially successful. Beginning in 1953 and throughout this period, the defendant operated under the trade name "Aloe Creme Laboratories, Inc.". Its first product was known under the trade name ALO-CREME OINTMENT which was changed to ALO-OINTMENT in 1963. Commencing in 1957, defendant began the manufacture of various cosmetics known as ALO-CREME FACE, and ALO-CREME HANDS, and ALO-CREME BODY, which names were abbreviated to ALO-FACE, ALO-HANDS, and ALO-BODY in 1963. Since 1963, the defendant has also used the trademarks ALO-PLUS, TRAV-ALO, ALO-MOISTURE PLUS, ALO-V SKIN CLEANSER, ALO-BEAUTY MATTE, ALO-TONE, ALO-ROUGE, ALO-LIPSTICK, ALO-POUDRE, ALO-V SHAMPOO, ALO-COS-

METICS, ALO-CABANA SET, ALO-LEGS, FASHION TAN and AFTER TAN, all of which were the subject of trademark registrations.

Plaintiff commenced operations on January 20, 1964, and made its first sales of products bearing trademarks on March 8, 1965. Plaintiff adopted as its trademarks, HOUSE OF ALOE, ALOE ESSENCE, DESIGN OF PLANT, JEL D'ALOE, MASQUE OF ALOE and TROPICALOE. After defendant notified plaintiff of its claim to a family of ALO trademarks which it claimed was infringed by plaintiff's use of ALOE in its trade names, plaintiff commenced this action asking a declaratory judgment finding defendant's trademarks invalid and upholding plaintiff's right to use its ALOE trademarks, together with a claim of unfair competition and antitrust violation. Defendant counterclaimed for trademark infringement and unfair competition. The district court found for the defendant-counterclaimant on all issues, dismissed the complaint, awarded treble damages and enjoined the plainitff from using ALOE in its trade names or trademarks.

Central to a determination of the issues in this case is whether defendant's use of the term ALO- is sufficient to preclude others from using the words Aloe or Alo. Also in question is defendant's claim to trademark registration of "ALO- and Design". We hold that defendant has no trademark rights, through use or registration, in the term "ALO-" by itself.

Aloe is the generic name of a large genus of succulent plants and of the drugs prepared from the aloe vera variety of that plant. (Webster's New International Dictionary, 2d ed. 1934.) In particular, for purposes of this

case, it is the generic name for the gel of the aloe vera plant. It is undisputed that in the absence of a strong showing of secondary meaning, a general name cannot be the basis of a trademark. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 83 L.ed. 73 (1938) (shredded wheat); *Henry Heide, Inc.* v. *George Ziegler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 343 F.2d 655 (7th Cir. 1965) (yo-yos).

Defendant concedes that this is the law, but maintains that it is not marketing "Aloe" as such, but is selling cosmetics containing Aloe, which are not encompassed within the generic or descriptive name and with respect to which the word "Aloe" is at most, suggestive. In view of the fact that Aloe is the distinguishing ingredient in defendant's products upon which its claims to special effectiveness are based, the Court must find that "Aloe" is the generic and descriptive term for that class of cosmetics containing Aloe and that any claim to a trademark in the name must be based on "secondary meaning".

The case is unlike *Coca-Coca Co.* v. *Koke Co.*, 254 U.S. 143, 65 L.Ed 189 (1920) where the term Coke or Coca was originally descriptive of the extract of Coca leaves, or cocaine contained in the plant, but which lost this generic sense when the plaintiff was compelled to remove any effective cocaine from the product, after which Coca or Coke acquired a purely secondary meaning. Neither is this case controlled by those decisions which have found that exact copies or phonetic equivalents infringe purely suggestive names which have acquired trade name significance, such as *Douglas Labs. Corp.* v. *Copper Tan, Inc.*, 210 F.2d 453 (2nd Cir. 1954) which said "copper

tone" for sun tan lotion was suggestive rather than descriptive, and *Orange Crush Co.* v. *California Crushed Fruit Co.*, 297 F. 892 (D.C. Cir. 1924) which said "Crush" was not descriptive of a soft drink and was not used in its generic sense; nor is it in the same class with those which hold that terms having a general descriptive but not denominative sense acquired secondary meaning. *Keller Products, Inc.* v. *Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954) (*Tub Cove* v. *Tub Kove; Speaker* v. *Shaler Co.*, 87 F.2d 985 (7th Cir. 1937) (*Hot Patches* v. *Hot Patches*—for vulcanizing products); *Barton* v. *Rex-Oil Co., Inc.*, 29 F.2d 474 (3rd Cir. 1928) (*Dyanshine* v. *Dye & Shine*—for shoe polish). It must also be distinguished from the Supreme Court's decision in *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315; 83 L.ed. 195 (1939) where the essentially descriptive and denominative term "nu-enamel" had acquired a secondary meaning at least partially through its widespread application to products other than enamel—such as paint brushes.

This case is properly classified with those where the term in question was the common name for the article sold and hence denominative of that article regardless of source. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 83 L.ed. 73 (1938) (shredded wheat); *Hnery Heide Inc.* v. *George Ziegler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 343 F.2d 655 (7th Cir. 1965) (yo-yos) and particularly with those cases where the term was denominative of the prime or distinguishing ingredient in the product. Company *LeBlume Import Co.* v. *Coty*, 293 F. 344 (2nd Cir. 1923) (*Lorigan* v. *L'Origan de Coty*—for perfume); *Pinaud, Inc.* v. *Huebschman*, 27 F.2d 531 (E.D.

N.Y. 1928) (*Lilas De France* v. *Lilas De France*—for perfume); *Wells & Richardson Co.* v. *Siegel, Cooper & Co.*, 106 F. 77 (N.D. Ill. 1900) (*Celery Compound* v. *Celery Compound*) with *Dixi-Cola Laboratories, Inc.* v. *Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941) (*cola* v. *cola*—for soft drink containing extract of cola nut). It is clear from an examination of the cases that while the test may be stated in the same language in both types of cases, it is much more difficult to establish secondary meaning in a denominative term (as used herein) than in a purely descriptive one.

The criteria for determining whether a denominative term has acquired the necessary secondary meaning to be a trademark are best described in the language of the Supreme Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 118, 83 L.ed. 73, 79 (1938):

> It is contended that the plaintiff has the exclusive right to the name 'Shredded Wheat,' because those words acquired the 'secondary meaning' of shredded wheat made at Niagara Falls by the plaintiff's predecessor. There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.

In the recent decision of *Henry Heide, Inc.* v. *George Ziegler Co.*, 354 F.2d 574, 576 (7th Cir. 1965) dealing with the term "ju-jubes" for fruit flavored gum candy, this Court said: "But more importantly, a generic term in circumstances such as those before us may not be exclusively appropriated as a trademark, regardless of the length of time it may have been used by a single distributor at the consumer level and despite whatever promotional effect he may have expended to exploit it." See *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 343 F.2d 655 (7th Cir. 1965); *Dixi-Cola Laboratories* v. *Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941).

The defendant-appellee, Aloe Creme Laboratories, Inc., here seeks to accomplish what the courts prohibited in the above cases. Having originated the use of a stabilized aloe gel in cosmetics and maintained a natural and legal monopoly in the product over a relatively long period of time, it seeks to prevent others from successfully competing in the Aloe cosmetic market by foreclosing their effective promotion of aloe products. Defendant cannot appropriate for its own trademark use the generic name of the distinguishing and effective ingredient in its product. Defendant has neither patent rights in the "ingredient concept" of using Aloe in cosmetics nor a legal right to maintain a monopoly in Aloe cosmetics. By using the phonetic equivalent of the generic name as the sole common and distinguishing mark of its products, defendant invited confusion. Until 1963, defendant differentiated its product by the name ALO-CREME, which would have come nearer to maintaining its trademark significance, but in the two to three years between the adoption of the singular ALO- and the filing of this suit, "Aloe" or "Alo" did not lose its generic meaning or denominative sense.

Those cases relied upon by defendant to establish the secondary meaning in the name of a plant used as an ingredient are distinguishable.

In *LeBlume Import Co.* v. *Coty,* 293 F. 344 (2nd Cir. 1923) the court found that Lorigan, or L'Origan, although generic when applied to a particular genus of plant, had come to mean the blended perfume produced by Coty, and not the fragrance of the particular plant. It laid stress on the fact that the perfume in question was a blend, unidentifiable with the genus of plants whose name it bore. In contrast, both plaintiff's and defendant's products here are promoted for their common ingredient—Aloe—with which both product lines are clearly identifiable. The defendant here cannot seek to promote its products by stressing the active ingredient which is available to all and also claim that the only proper name of that ingredient has lost its primary generic significance.

In *Pinaud, Inc.* v. *Huebschman,* 27 F.2d 531 (E.D. N.Y. 1928) the Court found that the French expression Lilas De France, when applied to a perfume long manufactured and promoted by one company, had acquired a secondary meaning, but it also indicated that the English counterpart of the same words, "French Lilac," was purely descriptive and without secondary meaning. In *Wells & Richardson Co.* v. *Siegel, Cooper & Co.,* 106 F. 77 (N.D. Ill. 1900) the Court found that the expression "Celery Compound" had acquired a secondary meaning and that others could not copy it, but it did not find that "Celery" had acquired a similar meaning. Thus a term which in itself does not have trademark significance may be combined with others in such a manner as to mean one product and one manufacturer only. While "Aloe" and

"Hands" may both be generic terms—as are most words—their combination in the phrase "ALO-Hands" may constitute a valid trademark as found by the Patent Office in issuing a registration for that term. Therefore, here the Court holds that the various ALO- trademarks of defendant in themselves are valid, but cannot be considered to have established a secondary meaning in the word Aloe itself. Others may not copy the exact trademarks used by defendant, because those have come to mean defendant's products exclusively, but they may use the word "Aloe" as part of their own trademark, just as defendant has done.

Defendant contends, and the trial court found, that it has a "family of ALO- trademarks" such as to preclude others from using the term "Aloe" in their trade names. This conclusion must be reversed. It is apparent that a generic term cannot be the basis of a family of trademarks such as to preclude others from using the term unless the term has acquired a "secondary meaning". Company *Lauritzen & Co., Inc.* v. *Borden Company,* 239 F.2d 405 (Court of Customs and Patent Appeals, 1956) with *Motorola, Inc.* v. *Griffiths Electronics, Inc.,* 317 F.2d 397 (Court of Customs and Patent Appeals, 1963). The family of trademarks doctrine is essentially similar to that of "secondary meaning". Without "secondary meaning" there is no "family of trademarks" in the sense defendant contends here. The lack of a "family of ALO-trademarks" does not, of course, invalidate each of defendant's registered trade names which share the "ALO-" term. Each trade name in itself may be distinctive enough to create a valid trademark even though the common term among the group has not achieved sufficient secondary meaning to preclude others from using the term.

Having determined that the generic term "ALO-" has neither achieved trademark significance, nor become the

basis of a "family of trademarks", we now examine defendant's claim of trademark registration of "ALO- and Design" in Registration No. 804,536.

The trial court in its finding of fact No. 16 found: "Defendant is the owner of the following trademarks and registrations therefor issued to it by the United States Patent Office: . . . No. 804,536 for ALO- and Design. . . ." This portion of finding No. 16 is clearly erroneous. Trademark Registration No. 804,536, while owned by the defendant, is not for "ALO- and Design", but rather for "Queen Nefertiti ALO and Design". This fact is made clear by the history of defendant's application for registration and the proceedings thereafter in the Patent Office.

On July 30, 1964, defendant applied for registration of "ALO- and design of a plant". The following drawing was submitted by the defendant:

The Patent Office treated this as an application for a trademark for "ALO and Design"; the Patent Office dropped the hyphen after ALO presumably because the drawing submitted included no hyphen.

On February 3, 1965, the Patent Office sent defendant notice of its refusal to register "ALO and Design". Among other reasons for the refusal, the Trademark Examiner pointed out that the mark was "merely descriptive of the goods . . . in that it set forth the substance from which the preparations are made together with a representation thereof, inasmuch as ALO is short for Aloe which is the genus designation for the species Aloe Vera and others."

Defendant's application for registration included a specimen of the following mark which had been used in defendant's advertising:

The Patent Office pointed out that this drawing could not be the basis of a registered mark in "ALO and Design" by itself since the word ALO and the design of the plant "is tied in with the portrait of Queen Nefertiti and *does not create a separate impression.*" (Emphasis added.) The Patent Office required the defendant to add the words "Queen Nefertiti" and her portrait to the drawing originally submitted. Defendant was further required to include a disclaimer of registration of the word "ALO" and the representation of the aloe vera plant.

Defendant amended its application to include the disclaimer of registration of ALO and representation of plant and submitted a new drawing which included the words "Queen Nefertiti" and the portrait of the Queen. The Patent Office then renamed the amended application "Queen Nefertiti ALO and Design". Defendant was sent notice that the "Queen Nefertiti ALO and Design" mark would be published on December 14, 1965. On March 1, 1966, the mark was registered and received No. 804,536.

A serious question as to defendant's good faith is raised by its claim that in No. 804,536 it owns the registration for "ALO- and "Design." The Patent Office specifically rejected defendant's application for registration of "ALO and Design" stating that "ALO" is a descriptive term. There can be no claim that "ALO and Design" as included in "Queen Nefertiti ALO and Design" has separate significance since the Patent Office informed defendant that the "ALO and Design" does not create a separate impression. Furthermore, in obtaining registration for "Queen Nefertiti ALO and Design" defendant *specifically disclaimed* registration rights in "ALO and the representation of the aloe plant" (as it was required to do by the Patent Office).

Defendant's questionable use of No. 804,536 began even before the mark was registered. On February 21, 1968, defendant sent letters to several hundred retailers in which it claimed to be the owner of "ALO- and design," a trademark "registered in the United States Patent Office." This letter, which theratened to "take whatever steps necessary" to stop "newly promoted competitors" from infringing on this and other trademarks, was sent nearly two weeks before the Patent Office registered the "Queen Nefertiti ALO and Design" mark.

In light of the foregoing, we remand this case for a redetermination of the question of defendant's unfair competition. We overrule the finding that defendant is the owner of a registered "ALO- and Design" trademark. We hold that defendant's use of the generic term "ALO-" has not created a secondary meaning in that word, and therefore, defendant has no exclusive trademark rights in the word "ALO-" by itself. We reverse the trial court's conclusion that defendant owns a "family of ALO- trademarks" such as to preclude others from using the word "Aloe" in their trade names.

We reverse the trial court's conclusion that plaintiff's TAN LIFE infringed defendant's FASHION TAN and AFTER TAN trademarks, because the only common word, "tan", is too descriptive to be the basis of trademark rights under the facts of this case.

On the basis of these conclusions we reverse the district court's holding that plaintiff was guilty of trademark infringement. We leave to the district court the determination of whether plaintiff was guilty of unfair competition absent of showing a trademark infringement.

Finally we come to the question of whether defendant is guilty of violating the antitrust laws by its use of its growers' supply contracts and its drugstore franchise agreements. We affirm the conclusions of the trial court that defendant's drugstore franchise agreements were not used in violation of the antitrust laws. However, we must set aside the conclusion of the trial court that defendant's growers' supply contracts were not used in violation of the antitrust laws since the district court's findings of fact are insufficient to support this conclusion.

Before there can be a conclusion as to whether there has been a substantial lessening of competition, monopolization, or a contract in restraint of trade, a determination must be made as to what are the relevant product markets within which to gauge a firm's power or the effect of its activities. In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 8 L.ed.2d 535 (1962) the Supreme Court stated:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute produce markets for antitrust purposes.

Factors such as a product's peculiar characteristics and uses, distinct prices, and sensitivity to price changes are all indicia which may be used in determining boundaries of a submarket.

The findings of fact made by the trial court do not provide a basis for its conclusion that the cosmetics industry is the relevant market. On remand, the district court should re-examine this question weighing the factors

set out in the *Brown Shoe* opinion. It will be necessary to make a determination whether there exists a separate market for aloe vera leaves. The district court will also need to inquire whether aloe vera products constitute a submarket of the cosmetic industry.

Once the district court has decided which product markets are relevant for antitrust consideration, the effect of defendants growers' supply contracts will have to be weighed within those markets. The ease of entry into these markets and the cost of aloe vera leaves to defendant and its competitors are findings of fact which will have to be made. On the basis of these findings, the district court will be able to decide the issues raised by plaintiff's charges of antitrust violation based on the defendant's exclusive contracts with the growers of a large percentage of aloe vera leaves produced in the United States.

Affirmed in part and reversed in part.

Remanded to the district court for further proceedings consistent with this opinion.

Appellant shall recover its costs of appeal.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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FILED

MAY 4 1970

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1398

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

MILSAN, INC. et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION

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INDEX

Question Presented 1

Statement of the Case 1

Argument—

I. This Court Should Not Be Burdened with Reviewing Disputed Facts 2

II. There Is No Conflict 3

Conclusion 4

Table of Cases

Graver Tank & Mfg. Co. v. *Linde Air Prod. Co.*, 336 U.S. 221 2

Kellogg Co. v. *National Biscuit Co.*, 305 U.S. 111 3

Rules

Civil Rule 52(a) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1398

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

MILSAN, INC. et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Respondents contend the only question presented for review is:

DID THE PETITIONER PRESENT EVIDENCE SUFFICIENT TO PROVE SECONDARY MEANING?

STATEMENT OF THE CASE

Respondent manufactures and sells beauty aids labeled Sandra Lee's Aloe Magic Skin Soap, Sandra Lee's Oil of Aloe Moisturizer, Sandra Lee's Lotions of Aloe, Sandra Lee's Aloes of Aloe, Sandra Lee's Aloesette and Sandra Lee's Powders of Aloe. It claims no trademark rights (R.

252) and contends only that the labeling of its products is descriptive of the contents (R. 234, 235).

The parties' competing products are packaged distinctively from each other (petitioner's products were introduced as their exhibits 34 through 50 and respondents' products introduced as defendants' exhibits 1 through 8) and petitioner's products are in a higher price range (petitioner's exhibits 8 and 53). There was no testimony about customer confusion between the competing products. Petitioner has no patent on its manufacturing process (R. 58).

Petitioner presented testimony of ten retail salesmen in an effort to prove secondary meaning of alo. All witnesses but one sold only petitioner's products (R. 465). Of the eight witnesses cross-examined, five were employed directly by petitioner (R. 88, 111, 148, 129, 139, 140) and another was the wife of petitioner's treasurer (R. 226). The lone salesman who sold the competing products testified that consumers seeking aloe products can be interested in either company's product (R. 200). This testimony was recognized by the trial court (R. 465) and the appellate court (Pet. App. 11) as refuting any contention that the evidence established secondary meaning.

ARGUMENT

I

This Court Should Not Be Burdened with Reviewing Disputed Facts.

This Court's function to review the trial court's finding of fact approved by the court of appeals is set forth in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 275.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot un-

dertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

The substantial evidentiary burden, necessary to prove secondary meaning to a generic term, was not met sub judice by the paucity of petitioner's attempted proof.

II.

There Is No Conflict.

The ruling below is only the application of Civil Rule 52(a), that findings of fact shall not be set aside unless clearly erroneous. The merit or lack of merit in petitioner's defeat in the Seventh Circuit on another legal theory has no relevancy whether certiorari should be granted here.

The question under consideration on the new *Nu-Enamel* case (305 U.S. 315) was "whether registration of 'Nu-Enamel' is permissible or impermissible under the act" (305 U.S. at 326). Secondary meaning in that case was admitted (305 U.S. at 320, 322 and 326) and the Court merely held that registration was permissible so as to confer jurisdiction in the federal courts. This case incidentally was decided the same term as *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, holding (at 116) "The plaintiff has no exclusive right to the use of the term 'Shredded Wheat' as a trade name. For that is the generic term of the article, which describes it with a fair degree of accuracy;". While the petitioner is not selling aloe, all their advertising (petitioner's exhibits 51, 73, 76, and 80) stresses aloe is the distinctive and effective ingredient in its products.

Secondary meaning was proven also in the *Coca-Cola* case (254 U.S. 143) and the only issue then before the Court was whether unclean hands would preclude an injunction.

CONCLUSION

The decision below is clearly correct. For this and the foregoing argument, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court

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No. 1494 and No. 1393

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1494

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

AMERICAN ALOE CORPORATION,
Respondent.

No. 1393

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

MILSAN, INC., et al.,
Respondents.

Petition for Rehearing

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1424

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

AMERICAN ALOE CORPORATION,
Respondent.

No. 1398

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

MILSAN, INC., et al.,
Respondents.

Petition for Rehearing

Petitioner in both of the above cases hereby petitions this court for rehearing of the decisions entered therein denying certiorari.

1. This Court's orders denying certiorari in both of the above cases were entered on May 25, 1970.

2. On that same date (May 25) a cross petition for certiorari was filed, entitled *American Aloe Corporation,*

Petitioner v. *Aloe Creme Laboratories, Inc., Respondent* (No. 1609). The petition in No. 1609 involves questions relating to the ALO- trademark, which was the subject of the petitions in both these cases.

3. As appears in respondent's brief in opposition to the cross petition for writ of certiorari filed in No. 1609, petitioner here (and respondent there) does not feel that the questions presented there are sufficient to merit the granting of a writ of certiorari to the Seventh Circuit.

4. In the event that this Court decides to issue a writ of certiorari in No. 1609, however, petitioner strongly feels that this Court should reconsider its denial of the petitions in the above cases and grant the writ in both of these cases so that the entire records will be before the Court.

5. The denial of the writs of certiorari in both these cases and the simultaneous petition for writ of certiorari by petitioner in No. 1609 is an event which the petitioner in both these cases could not have anticipated at the time the petitions were filed.

6. If this Court considers the antitrust questions involving the ALO- trademark which are raised by the petition in No. 1609, it should grant certiorari in both of these cases to consider the validity of the ALO- trademark.

Respectfully submitted,

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE OF COUNSEL

CHARLES J. O'LAUGHLIN, being sworn on oath states as follows:

1. He is an attorney admitted to practice law in the State of Illinois and before this Honorable Court.

2. The foregoing petition for rehearing presented in cases Nos. 1424 and 1398 is presented in good faith and based upon facts which this affiant states to be true.

3. The foregoing petition for rehearing presented in cases Nos. 1424 and 1398 has not been submitted for the purpose of delay.

.....
Charles J. O'Laughlin

Subscribed and sworn to
before me this ..... day of
June, 1970.

.....
Notary Public